CHAPTER 8

International Commercial Arbitration Practice in Latin America*

SYNOPSIS

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§ 8.01 Introduction: International Commercial Arbitration Practice in Latin America

Technology and communications in the form of computers, internet, cable/satellite TV, and especially cellular telephones have brought rapid changes to Latin America in business, but slower change in the legal area. Until the 1990s, arbitration had been frozen in time since the 19th century restrictive *Calvo doctrine*[1] was embraced by most Latin states. Only recently has arbitration been taken out of the icebox to accompany the trend towards privatization and globalization in the region. Since then, arbitration has taken on a variety of forms, the most prominent being commercial arbitration involving businesses, investor-state arbitration, and trading bloc-based arbitration. This chapter, as well as this treatise, will deal only with the first of these forms—commercial arbitration—whether between private businesses or between businesses and the state as a commercial or quasi-commercial party.

Geographically, this chapter focuses primarily on Latin America as opposed to the Caribbean. International commercial arbitration is not as widely recognized in the Caribbean as in Latin America because: (i) we have a wide array, and even mixtures, of different legal systems in these small countries,[2] and many of these countries lack

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[1] This doctrine was named after the 19th century Argentine diplomat Carlos Calvo. It holds that only national laws can regulate the rights of foreign investors, and that foreign investors must seek redress through local courts alone. Under this doctrine, foreign investors may not seek redress through diplomatic protection or in jurisdictions outside the state, such as international arbitration.

[2] The region has different systems of law based on historical colonization of the various islands by different European countries: Commonwealth Caribbean (Independent countries with British legal orientation); Dependent British Caribbean (remaining British dependencies); French Caribbean (primarily Martinique and Guadeloupe which are actually French *départements* like those provinces in metropolitan France, but also the independent island of Haiti which has French tradition); Dutch Caribbean (St. Maarten, Curaçao); U.S. Caribbean (primarily Puerto Rico which has a "dual law" system: Spanish-based civil codes covering certain areas, combined with U.S. federal law in other areas); and Spanish

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standardized modern arbitration statutes; (ii) uncertainty persists with respect to the technical expertise and practical experience of the Caribbean national courts in dealing with international commercial arbitration cases, especially in relation to how courts may treat international arbitral awards after they are rendered, as there is little precedent; and (iii) not all Caribbean countries are members of the New York Convention, although the Dominican Republic ratified it recently.

§ 8.02 Arbitration and Political and Economic Change in the Region

In 2006 and 2007, new presidential elections were held in Argentina, Bolivia, Chile, Ecuador, Mexico, Nicaragua, Peru, and Venezuela. The administrations elected in these countries were, generally, more nationalistic in tone than their predecessors. In this respect, we have seen reverse movement away from the region's "neo-liberal" political-economic model, championed by Washington and large international businesses in the 1990s, that emphasized privatization and globalization. Proponents who want to re-nationalize former state assets and block further privatizations complain that these assets have been sold off and privatized at bargain-basement prices to wealthy oligarchs and foreign interests with little or no benefit to the local population.

To a certain degree, the institution of arbitration has become caught in this debate because it is the dispute resolution method of choice in many privatization deals involving foreign participants. While some politicians have called arbitration merely a tool of foreign economic interests, it must be recalled that international arbitration as an institution has existed and thrived since the days of Ancient Greece and Rome—many centuries preceding privatizations in Latin America.[3] Moreover, if arbitration did not exist, there would likely be far less investment in the region today because investors would be wary of local "home court" judiciaries and all the issues they bring:

> Investors are suspicious animals—before placing their capital in markets not known for political or economic stability, they need to see a clear 'exit' sign, ensuring safe passage for capital and returns to their home state when problem arise. Local court litigation in Latin America does not usually provide sufficient assurances for investors in the event of a dispute for a number of reasons, including:
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> - Unfamiliarity with local procedures;
> - Risk of partiality of the local court towards the local party (*e.g.*, protection of local employment or state participation in the project which forms the object of dispute);
> - Risk of corruption (whether this is well-founded or not, the investor acts according to its prejudices);
> - The judgment will not be easily enforced outside of the local jurisdiction in the event that enforcement is sought against assets elsewhere (there are few treaties providing for reciprocal recognition and enforcement of court judgments);
> - Risk of delay (some courts take up to six years to reach a first instance decision); and

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Independent Caribbean (Dominican Republic and Cuba, with the latter having a socialist overlay).

[3] *See* N.G.L. Hammond, *Arbitration in Ancient Greece*, 1 Arb. Int'l No. 2 (1985), ps. 188 and ss.; Ottoarndt Glossner, *Arbitration: a glance into history*, in *Liber Amicorum Hommage a Frederic Eisemann*, ICC publications, 1978, ps. 19 and ss.

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VER: [SC_00150-Local:30 Jul 10 18:59**][MX-SECNDARY:** 16 Jul 10 02:41**][TT-:** 24 Mar 10 08:33 loc=usa unit=01530-ch0008**]** 0

- Risk of appeals (unlike most institutional arbitration).[4]

As is the case in many parts of the developing world, bias by Latin American courts is even more possible where a state (national government) is a party to a conflict because the judiciary in many countries of the region is still dependent in many ways on the executive branch. Therefore, neutral institutions and venues are needed to decide disputes, especially between parties coming from different countries. The challenge is to create and manage these in a way so that all interests are fairly considered.

In Venezuela, we have recently witnessed one of the most visible and imminent threats to arbitration in the region. The country is one of the states flexing its new or renewed petro-muscular authoritarian government style in a world where oil has been fetching peak prices in international markets. In his acceptance speech for a second six-year term, President Hugo Chávez announced his intention to place a firmer nationalized grip on the oil, cement, electrical energy, and telecommunications industries, among others. Previously, the Venezuelan government-owned oil giant, PDVSA, had reportedly demanded in its negotiations an end to arbitration clauses in joint oil exploration contracts with foreign companies. This would be ominous indeed, as the oil and gas industry in Latin America is one of the main users of international arbitration. It would also raise concerns that arbitration of disputes related to other contractual matters with foreign investors would not be negotiated by Venezuelan authorities.[5]

Now, the questions here are: will the more nationalistic political tide in Latin America alter the economic and legal climate, types of controversies available to arbitrate, and willingness of governments to arbitrate? If so, these developments will pose serious challenges to the progress made in developing international arbitration in Latin America. Although investor-state arbitration is not within the scope of this article, we note that Ecuador, Bolivia, and Venezuela have all made moves within the last year to limit their participation in the International Centre for Settlement of Investment Disputes (ICSID), the World Bank organ created to handle investor-state disputes. A related question is, to what extent will this attitude spill over into the commercial arbitration area in Latin America?

Finally, a new trend observed in the region is the dramatic growth of trade with and investment in the region by China, primarily in the natural resources and agricultural sectors. Latin American contracts with Chinese entities may contain arbitration clauses as a convenient way to resolve these trade and investment-related disputes. It is early to arrive at conclusions, but this is an important development worth watching.

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[4] Nigel Blackaby & Sylvia Noury, Freshfields Bruckhaus Deringer, *International Arbitration in Latin America*, Latin Lawyer Review—Arbitration (undated article distributed at international arbitration seminar).

[5] For more detail and analysis on this aspect, *see* Chapter 21 *below* (International Arbitration Practice in the Oil and Gas Sector—Venezuela), by well-known Venezuelan international arbitrator, J. Eloy Anzola.

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XPP 8.1C.1 Patch #6 SC_00150 nllp 1530 [PW=500pt PD=684pt TW=380pt TD=580pt]
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§ 8.03 Domestic Legal Systems Affecting Arbitration in Latin America

An introductory word about legal systems in Latin America may be in order here for readers not familiar with this subject. Most countries in Latin America have civil law systems historically based on the Napoleonic Code. There are also several former British colonies, primarily Caribbean island nations, which retain the English style common law system.

Additionally, the island of Puerto Rico, while politically part of the United States, has a strong Spanish heritage, and for this reason, is one of the few *dual-law* jurisdictions in the world, along with: Kenya; Indonesia; the Province of Québec, Canada; and the state of Louisiana, U.S. The expression *dual law* means that in certain spheres of activity, one legal system is used while in others, a different legal system is used.[6] In Puerto Rico, the civil law system is used to govern commercial transactions as well as many personal legal matters. However, the U.S.-style common law system governs certain U.S. federal questions (antitrust and environmental, for example), especially those heard in U.S. federal courts that have jurisdiction over Puerto Rico. Although a U.S. possession, Puerto Rico is considered a part of Latin America from both cultural and multinational business management standpoints. While Puerto Rico has traditionally been one of the most litigious territories in the hemisphere, arbitration has also gained a relatively strong toehold there.

Primarily in its application, civil law in Latin America differs significantly from that in Western Europe. While code norms in Europe are generally well-observed in practice, many of these in Latin America remain theoretical on the books. There is often a wide gap between the law as it is captured in codes and its actual practice in Latin America—as is said in Argentina, "*Entre el dicho y el hecho hay mucho trecho*" ("There is a lot of space between the word and the deed"). For Brazilians, "*há lei que pega e lei que não pega*" (in Brazil, there are two types of statutes, those which are respected, and those that are not). The other difference is that in Latin American civil law systems, many laws on the books express general principles which must then be defined more clearly by administrative or other regulation. These regulations are not issued much of the time, leaving gaps in the law to be interpreted. This can, of course, present an interesting challenge to arbitrators in cases involving questions of law in Latin America.

§ 8.04 Arbitration in Latin America and the Current Economic Crisis

As a result of the economic crisis beginning in 2007 (initial worldwide oil price spikes combined with increasingly difficult access to productive oilfields, limited supplies with rising Asian demand for oil, real estate and accompanying financial sector meltdown in the U.S., credit shortages, etc.), most arbitral institutions have reported dramatic jumps in their caseloads. Latin America is no exception, having seen phenomenal growth in institutional commercial arbitration over the last decade. More

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[6] In Indonesia, for many years the traditional Muslim *Adat* law system was used for family matters alongside the Dutch colonial based law system for commercial matters. In Québec and Louisiana, civil law systems coexist with common law systems.

details on this can be found in § 8.07[2] *below*.

In addition, Latin America has been at the forefront of investor-state arbitrations at ICSID and other investor arbitration forums, as a record number of investor-state arbitrations stem from Argentina's own economic crisis in the early 2000s. While investor-state arbitration is outside the scope of this book, the role of the state (national government) in Latin American commercial activities has traditionally been large, so it is appropriate to speak here about acceptance of arbitration in Latin American government-related commercial contracts.

§ 8.05 Acceptance of Arbitration in Latin American Government Contracts

An important measure of the acceptance of arbitration in the region is the degree of use of arbitration in contracts involving Latin American governmental entities in a variety of para-statal and commercial activities. This is because even though waves of privatizations of former state-owned enterprises crested in the late 1990s, the state still plays a very large, if not dominating role in many Latin American economies. When a public entity or a mixed-capital company (mixed public and private ownership) is involved, the submission of questions to international arbitration usually touches matters of high political sensitivity and public visibility. International arbitration involving state parties has been a subject of growing debate. This is in part due to the increasing importance of ICSID arbitration and in part to the many arbitration proceedings initiated by foreign private investors against the governments of Argentina, Bolivia, Ecuador and Venezuela. In general, the presence of a public entity in arbitration gives rise to a clear division between the private interest of the foreign private-law company and the public interest that state parties are supposed to protect. Recent cases in Latin America where a state is involved demonstrate the continuing politicization of arbitration characterized by domestic court interventions in international arbitration. This is particularly true in the energy sector, where abrupt increases in oil and gas prices put tremendous political pressure on local governments to recuperate allegedly "excess" revenues from foreign investors.

In the *Yacyretá* case[7] for example, Argentine courts granted an injunction ordering suspension of the ICC (International Chamber of Commerce/Paris) arbitral process until the terms of reference—which had been approved by the ICC Court—were reviewed by the competent court in Argentina. The decision was based on an *obiter dictum* in the *Cartellone* case[8], according to which, there is always the possibility of resorting to state courts if the arbitrator's decision is "unconstitutional, illegal or unreasonable." *Cartellone* raised some debate as to its real impact on international commercial arbitration, but this decision seems to be an erroneous judgment more than a potential hazard to private arbitration.[9]

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[7] Argentina First Instance Court, Federal Administrative Court, September 27th, 2004, *in re* Entidad Binacional Yacyretá v. Eriday, Rev. La Ley, 2005-A, 12.

[8] Argentina Supreme Court, June 1st, 2006, *in re* José Cartellone Construcciones Civiles S.A. v. Hidronor S.A., Rev. Fallos, 327: 1881.

[9] For a critical comment on *Cartellone*, *see* Roque J. Caivano, *Alcances de la revisión judicial en el*

As in other Latin American countries, arbitration involving the state or a state-owned company has been the subject of hot debate in Brazil. Briefly, it can be said that according to Brazilian law, two principles apply in determining whether a dispute with a state or state-owned company can be arbitrated. The first is the "principle of legality" set forth in Article 37 of the Brazilian Constitution, according to which, public assets and rights are always subject to prior legislative authorization. The second principle is one of *arbitrability*—which the government—or indeed any party, whether public or private - can agree to arbitrate only with respect to so-called "disposable assets" (*bens ou direitos disponíveis*).[10] Although the issue is far from being solidified, the latest court decisions reveal an important trend.

These issues were raised before the state court in the State of Parana, Brazil, in the case of *Companhia Paranaense de Energia* (Copel) *v. UEG Araucaria Ltda.* (UEGA).[11] The facts of the case can be summarized as follows: In May 2000, Copel, a state owned entity, entered into an agreement[12] with UEGA, a foreign-owned project company (majority indirect ownership by El Paso, a U.S. corporation), for the construction of a gas turbine power plant in the region of Araucaria, Paraná, Brazil. The plant was declared commercially operable in 2002.

In January 2003, the then newly-elected "nationalistic" governor of the State of Paraná unilaterally stopped monthly payments for allegedly political reasons. UEGA commenced arbitral proceedings against Copel before the ICC in Paris. A few months after being served with the arbitration proceedings, Copel filed an anti-suit injunction designed to enjoin UEGA from pursuing the arbitration anywhere before the Second Lower Treasury Court of the State of Paraná. This suit was designed to prevent UEGA from pursuing the arbitration anywhere. It also sought a declaration of nullity of the arbitral clause. Copel argued that the arbitral tribunal lacked jurisdiction to hear the case because it was not subject to arbitration for both subjective and objective reasons based upon: (i) Copel's status as a corporation controlled by the State of Paraná and (ii) the nature and scope of the contract itself, which comprised matters of public interest.

The court granted the injunction in favor of Copel on the grounds that disputes with state controlled entities should be submitted to the local courts. In addition, UEGA was ordered to refrain from taking any action on the arbitration, subject to a daily penalty of approximately $400,000.00 U.S. dollars. UEGA filed an interlocutory appeal before the Paraná State Court of Appeals,[13] but was denied the requested preliminary

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arbitraje. Comentario a la sentencia de la Corte Suprema de Justicia Argentina in re Cartellone, Revista Brasileira de Arbitragem, Ano II, N 5, 2005, ps. 159 and ss.

[10] Generally speaking, "disposable assets" under Brazilian law are those freely transferable assets which are primarily monetary or economic in nature. They may or may not include public assets with monetary value, depending on the context in which these public assets are being dealt with.

[11] *See* Companhia Paranaense de Energia (COPEL) v. UEG Araucária Ltda., Third Court of Public Finances of Curitiba, Decision of 15 March 2004.

[12] The contract called for ICC arbitration in Paris.

[13] The highest court at the State level.

suspension order. On a different appeal however, on procedural grounds, Judge Rui Fernando de Oliveira granted UEGA a stay order against the lower court decision. In the meantime, the arbitral tribunal rendered a partial award confirming its jurisdiction.

The stay order was challenged by Copel twice inside the Paraná State Court of Appeals. On the first challenge, the Fourth Civil Chamber of the Court unanimously upheld Judge Oliveira's decision. It was held that there is no *prima facie* reason under Brazilian law preventing state controlled entities from agreeing to settle their business disputes through arbitration. In a very important move, the court also held that preventing UEGA from proceeding with the arbitration would violate its constitutional rights to access appropriate jurisdiction because this was the dispute resolution method agreed upon by the parties. Eventually, the parties settled before a decision on the merits in the arbitration was rendered.

An equally important decision was rendered in the case of *Copel v. Energetica Rio Pedrinho S.A.*[14] Here, a popular action[15] was also filed before the Second Lower Treasury Court of the state of Paraná seeking an injunction to stay arbitral proceedings in progress before the Getulio Vargas Foundation Conciliation and Arbitration Chamber, a local Brazilian arbitral chamber. The arguments were similar to those presented in *Copel v. UEGA*, although here it was a domestic case. The district court granted the order. The arbitral tribunal—which had already been constituted—already denied Copel's request to this end. The Paraná State Court of Appeals reversed the lower court decision. Delivering the opinion for the court, Judge Fernando Zeni held that ". . . there is no impediment for a government controlled legal entity governed by private law to enter into agreements or to resolve disputes via arbitration, since the matter referred to arbitration is merely of an economic nature and does not involve any public interest."

In another State of Paraná case involving *Companhia Paranaense de Gas* (Compagás) *v. Carioca Passarelli Consortium* (Consortium),[16] the Paraná State Court of Appeals again had the opportunity to rule on the issue of *arbitrability* where a state-owned company was involved. *Compagás*, a mixed-capital company, was entitled to explore piped gas services and contracted with the Consortium via a bidding process to provide services related to its distribution network. A dispute arose between the parties regarding economic and financial adjustments to the contract, and the parties started arbitration to settle the dispute. The award was rendered in favor of the

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[14] *See* Companhia Paranaense de Energia (COPEL) v. Energetica Rio Pedrinho S.A., Court of Appeals of the State of Paraná, Decision of May 10, 2005.

[15] A popular action (*ação popular*) aims to defend the public interest as defined in article 5, item LXXIII of the Brazilian Constitution, which holds that "any citizen has standing to institute an action seeking to annul an act against the public property or to property pertaining to an entity in which the State participates, to administrative morality, to the environment, and to historical and cultural monuments, and the plaintiff shall, except in the event of proven bad faith, be exempt from court costs and from the burden of loss of suit."

[16] Appeal n. 247.646-0—Paraná Court of Appeals—http://www.tj.pr.gov.br/consultas/judwin/ResultCodigo.asp?Codigo=610685.

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VER: [SC_00150-Local:30 Jul 10 18:59**][MX-SECNDARY:** 16 Jul 10 02:41**][TT-:** 24 Mar 10 08:33 loc=usa unit=01530-ch0008**]** 0

Consortium and Compagás brought an action in state court seeking to vacate the award on several grounds.

On the issue of arbitrability, Compagás' argument that the award was null and void because the matter involved public interests was rejected. It was held that:

> Compagás is a business corporation governed by private law of which the government is a shareholder and . . . [i]t is therefore obvious that contracts entered by and between the appellant and appellee are governed by private law and that there is absolutely nothing against conflicts arising therefrom being decided by arbitration as provided by Brazilian law." In another part of its judgment, the court affirmed that "[t]he use of arbitration is even more adequate when it concerns the acts of governmental companies involved in the exploration of economic activities which are governed by the same legal system applicable to private companies, according to article 173, paragraph one of the Brazilian Constitution.[17]

Finally, in the *Companhia Estadual de Energia Elétrica* (CEEE) *vs. AES*[18] case, the arguments were similar to those raised in the above-mentioned cases. In addition, it was argued that the wording in the arbitration clause did not have a binding effect since it stated that the disputes "may" be solved by arbitration. CEEE, a mixed-capital entity, sought an injunction to stay arbitral proceedings that had already started before the ICC. The district court judge of the State of Rio Grande do Sul granted relief, and the Court of Appeals of Rio Grande do Sul State affirmed the lower court ruling.

In a decision rendered on October 25, 2005, the Federal Superior Court of Justice (STJ) reversed the Rio Grande do Sul Appeals Court's decision. The court held that mixed-capital companies are governed by the same rules applicable to private companies, and are thus fully capable of resolving disputes through valid and binding arbitration agreements. The opinion also held that the refusal of the plaintiff (appellee) to submit to arbitration violated the principle of good faith and that the arbitration clause was binding on both parties. This decision prevented state-courts from interfering in the arbitral proceedings, at least at this stage of the dispute. The AES case is already considered to be a powerfully persuasive precedent—although not binding under Brazilian law—regarding *arbitrability* of disputes involving public administration after the enactment of the Brazilian Arbitration Law in 1996.

In the legislative arena, there has been progress in Brazil as well. The Public-Private Partnership (PPP) Law includes some special arbitration provisions to help resolve disputes arising in public-private infrastructure projects where the federal or state government partners with private sector participants in these projects. In Brazil, recently-enacted PPP laws at both federal and individual state levels provide a skeleton for an arbitration scheme to resolve large infrastructure project-related disputes. While these PPP laws are heralded as a way to help attract private investment—both domestic and foreign—the arbitration provisions have also been criticized because they require all PPP related arbitrations to be held in Brazil and conducted in Portuguese. It would

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[17] Art. 173, paragraph 1: "Public companies, mixed capital companies, and other entities engaged in economic activities are subject to the specific legal regimes governing private companies, including those with respect to labor and tax liabilities." (unofficial translation).

[18] Case CEEE vs. AES. 18, *Revista de Direito Bancário e de Mercado de Capitais e de Arbitragem*, 389.

seem that a carve-out exception to the standard PPP arbitration provisions would be desirable for international arbitrations.

§ 8.06 The Arbitration Agreement

In the last 10 to 20 years, most Latin American countries, which have earned a reputation as being hostile towards arbitration, have enacted modern statutes, most of which claim to be based on the UNCITRAL Model Law (Model Law). Many of the statutory improvements deal with the effectiveness of parties' arbitration agreements, which are in the form of contractual arbitration clauses.[19]

According to Blackaby:

> The arrival of the [UNCITRAL] Model Law was well timed for Latin America: it offered legislators a means of implementing a new and modern legislation without the need to reinvent the wheel and ensured that the lack of an arbitral tradition did not prejudice the quality of any new law. It was the best starting point for Latin America, which in general did not have such an arbitral tradition. Each country only had to examine whether or not it was necessary to add or reject certain elements in order to enable the law to be coherent with its legal system. Mexico was the first country in the region to adopt the Model Law in 1993. As a result, it gained a competitive advantage over its neighbors and remains to this day the jurisdiction which hosts most international arbitrations in Latin America. Other countries in the region which have followed the same route include Bolivia, Guatemala, Paraguay, Peru, Venezuela, and, more recently, Chile, which adopted a new arbitration law closely based on the Model Law in September 2004.[20]

However, efforts to enact a modern arbitration law based on the Model Law in Argentina and Colombia have been met with less success for political reasons. Brazil enacted new arbitration legislation[21] that applies to both domestic and international arbitrations. The previous Spanish arbitration law[22] and the Model Law were the source of inspiration for the Brazilian Arbitration Law (BAL). There are, however, relevant differences between the Model Law and the BAL. One of them is the fact that the latter retains, in some circumstances, the traditional problematic requirement of a post-dispute submission agreement (*compromisso*).

The BAL introduced many adequate changes in legal text, although the *compromisso* remains. However, use of the compromisso now falls under specific circumstances. Therefore, it is important to understand the distinction between the pre-dispute contractual arbitration clause and the post-dispute *compromisso* in the legal text and the so-called *full arbitration clause* and *empty arbitration clause* as distinguished in the case-law.

Article 5-agreements came to be defined by Brazilian case-law as *full arbitral*

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[19] For a comparative and historical analysis of the evolution of the arbitration clause, with special reference to Latin America, *see* Roque J. Caivano, *La cláusula arbitral, Evolución histórica y comparada*, ed. Universidad del Rosario, Bogotá, 2008.

[20] *See* Nigel Blackaby & Sylvia Noury, Freshfields Bruckhaus Deringer, *International Arbitration in Latin America*, Latin Lawyer Review – Arbitration (undated article distributed at international arbitration seminar).

[21] Law 9307 of September 23, 1996, published at the Official Gazette on September 24, 1996.

[22] Law 36 of December 5, 1988.

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XPP 8.1C.1 Patch #6 SC_00150 nllp 1530 [PW=500pt PD=684pt TW=380pt TD=580pt]
VER: [SC_00150-Local:30 Jul 10 18:59]**[MX-SECNDARY:** 16 Jul 10 02:41]**[TT-:** 24 Mar 10 08:33 loc=usa unit=01530-ch0008] **0**

clauses, and as a consequence, required no need for a later post-dispute *compromisso* signed by both parties. Perhaps more important, the *full arbitral clause* is sufficient to repel state-court jurisdiction, being able, *per se*, to establish the arbitration. On the other hand, Article 6-agreements have been defined as *empty (blank) arbitral clauses*. This is the scenario where the clause does not indicate a method of initiating the arbitration; thus, the interested party now has to seek assistance from the court.

In *Renault do Brasil S.A. and others* (Renault) *v. Carlos Alberto de Oliveira Andrade*[23] (CAOA), the São Paulo State Court of Appeals recognized the principle of party autonomy and the validity of an ICC arbitration clause (Article 5-agreement) in a contract entered into between a French car manufacturer and its former dealer in Brazil. In this case, a clause in the contract referred to arbitration in New York under the ICC Arbitration Rules. A dispute arose between the parties, and CAOA challenged the jurisdiction of the arbitral tribunal, which had already been constituted pursuant to ICC rules. CAOA filed a motion before the Brazilian courts and argued that the arbitration should be commenced through a *compromisso*. In a preliminary decision, the District Court granted the motion. The court recognized the existence of the arbitral clause, but held that it did not have a binding effect because the parties had not signed the *compromisso*. The Court of Appeals reversed on the grounds that the arbitration clause contained all the necessary elements to initiate arbitration without the need for judicial support or intervention. It was held that Brazilian courts lacked jurisdiction to examine preliminary questions about the effects of arbitration clauses. Such matters could only be heard by the arbitral tribunal pursuant to Article 8[24] of the Brazilian Arbitration Law which recognizes the principle of *kompetenz-kompetenz*, the right and duty of an arbitral tribunal to determine its own authority and jurisdiction to hear the case.

This decision has a significant importance in the development of arbitration in Brazil because it ruled on controversial issues as follows: "First it recognized that Article 7 of the Law—which deals with a claim before State Courts by which one party asks the judge to rule on the *compromisso*—does not apply to cases covered by Article 5. Second, it holds that arbitration can begin without the need for the execution of a post-dispute submission agreement (*compromisso)* where the parties enter into a full arbitration clause. Thirdly, the courts have a responsibility to make sure that the principle of autonomy of the parties prevails in arbitral matters."[25]

However, in 2008, a panel of the highest court in the Brazilian state of Paraná held that a *compromisso* (post-dispute submission agreement, duly signed and executed by the parties) was indeed required in the case of *Inepar v. Itiquira.* This case's effect was limited to the Brazilian state of Paraná and the decision is considered aberrant by

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[23] *See* 36th District Court of Sao Paulo. N. 000.99.045649-8, June 25, 1999.

[24] Art. 8—sole paragraph: "It shall be up to the arbitrator to decide on its own motion or per request of the parties, the issues concerning the existence, validity and efficacy of the arbitration agreement and of the contract which contains the arbitration clause" (unofficial translation).

[25] Arnoldo Wald, Patick Schellenberg, Keith Rosenn, *Some Controversial Aspects of the New Brazilian Arbitration Law*, 31 U. Miami Inter-Am. L. Rev. 223, 236 (2000).

many. Nevertheless, it did send a mini-tsunami through the Brazilian and international arbitration community, which has been waiting for updated developments on this case.

In addition, there have been disputes over the type of arbitration stipulated in the arbitration clause of the parties' contract. Two cases from Central America illustrate the problem. The first is from El Salvador, and the second from Honduras. Clauses involved in both cases posit *ad hoc* arbitration versus institutional arbitration in certain situations.

In the El Salvador case which was last reported in 2007, two international telecommunications companies, Americatel and Compañia de Telecommunicaciones de El Salvador, SA de CV (CTE), entered into a sophisticated commercial agreement in 2003. The agreement provided for final resolution of all disputes by arbitration, but provided for one type of arbitration for a certain class of disputes and another type of arbitration for all other disputes.

The parties' contractual dispute resolution clause included a minimum 60-day negotiation period between the parties. If the issue was related to payment/billing or confidentiality, the matter would go to an *ad hoc* arbitration in El Salvador's capital city, San Salvador, and hearings would be held in Spanish. Each party would choose an arbitrator and the two chosen arbitrators would select the third. The arbitration would be *at law*, meaning the arbitrators may not use principles of equity to go outside the applicable law in order to decide the case. El Salvador law would govern the contract; and there would not be any contractual limits on special, incidental, punitive, and consequential damages.

But if the dispute involved any other issues besides the ones described in the previous paragraph, then the arbitration would be administered by the American Arbitration Association (AAA) using its International Arbitration Rules and take place in San Salvador unless the parties agree otherwise. The rest of the arbitral procedure would be the same as in the preceding paragraph.

The arbitral panel convened under AAA Rules since the main issue in the dispute was adequacy of access to communications ports provided to Americatel by CTE. After the panel held its hearings and rendered its award, Americatel commenced litigation in the U.S. to enforce the award while CTE litigated in El Salvador to vacate the award, alleging that the panel was illegally constituted. Final decisions of the courts in both countries were still pending as of the date this chapter was written.[26]

The Honduras case also involved an unclear arbitration clause in a contract between U.S. and Honduran parties in the sports marketing sector. The clause called for *ad hoc* arbitration to be instituted and held in the city of the party first launching the arbitration. It also required the use of "the AAA Arbitration Rules," but did not specify which set of AAA Arbitration Rules. The arbitration was held in the U.S., with a retired judge arbitrating the case and "borrowing" the AAA Commercial Arbitration Rules.

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[26] For more details and analysis of this case, *see* Mason, Paul E. "Paul E. Mason on Problems with "Dual System" Arbitration Clauses." *LexisNexis® Emerging Issues Analysis*, 2008 Emerging Issues 1831 (January, 2008).

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More detail on this case may be found in Chapter 40 *below* regarding international arbitration in the sports industry.

§ 8.07 Conduct of Arbitral Proceedings

[1] Arbitrator Selection

[a] Some Legal Considerations

In certain places in Latin America, the parties' choice of arbitrator is regulated and limited. As far as we know, the court-ordered restriction in Costa Rica remains in effect—arbitrators for cases heard in Costa Rica must be Costa Rican lawyers.[27] This strictly limits party autonomy and, therefore, the use of international arbitration in Costa Rica in at least two ways: nationality and profession. Arbitrators are normally chosen by the parties or an arbitral institution and can come from any country. However, in international cases, in order to maintain an image of neutrality, several arbitral institutions—especially in cases involving governments as parties—require the arbitrator(s) to be from countries other than that of either party. Arbitrators do not need to be attorneys—often accountants, architects, business executives, or engineers may be preferred, depending on the type of case. A panel of three arbitrators with diverse professional backgrounds and abilities may be ideal for certain cases. Restricting the parties' choice of arbitrators to only Costa Rican lawyers places Costa Rica at a certain disadvantage because not many foreign parties would agree to arbitrate in Costa Rica under this restriction.

According to eminent Chilean arbitrator, Gonzalo Biggs, as applied to arbitrations seated in Chile, arbitrators *in equity* can come from any country and any profession, but arbitrators *at law* must be Chilean lawyers or foreign lawyers who have received their full legal education in Chile.[28] In Chile, an arbitrator *at law* must decide the case in accordance with Chilean law and must apply both in the proceedings and issuance of the final award, the rules established for ordinary judges as required by the nature of the submitted claim. On the other hand, an arbitrator *in equity* is governed by what prudence and general equity principles may dictate, and the arbitrator is not compelled to apply in his or her procedures and award any other rules than those which the parties expressed in their deed of appointment. If nothing is stated therein, then the rules established for this purpose by the code of civil procedure apply. In addition, Chilean law also contemplates *mixed arbitrators* whereby parties are allowed, in some cases, to grant arbitrators at law the powers of an arbitrator in equity with regard to

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[27] *Is Latin America Ready for the Big Argument?*, 2 Latin Lawyer, Issue 6, 26 (2004).

[28] The pertinent provision of Chile's *Código Orgánico de Tribunales* states: "Art. 225: Any person of majority age and with control of his property and who can read and write, may be nominated as an arbitrator. Lawyers qualified to practice the profession may be arbitrator even if minors in age. Only a lawyer may be nominated as an arbitrator at law." In turn, Article 526 of the same Code formerly stated that: "Only Chileans may practice the profession of lawyer. This is without prejudice to what is provided in international treaties in force." However, Article 526 was recently amended to provide that: "Chileans, and resident foreigners who have completed their entire legal studies in Chile, may exercise the profession of lawyer. . .."

procedure. However, arbitrators must strictly apply the law in the issuance of the final award. Dr. Biggs is of the opinion that although the code (*Código Orgánico de Tribunales)* says nothing on the subject, because mixed arbitration awards must be issued in accordance with Chilean law, the arbitrator must also be a lawyer, and therefore, a Chilean citizen.

As noted above,

> A question on the Chilean law is whether it modified the prior requirement that for all arbitrations held in Chile, the arbitrators must be Chilean lawyers. In domestic arbitrations, any arbitration decided at law (as opposed to equity) must be decided by an attorney. [Chilean law] requires Chilean attorneys to have Chilean nationality. Therefore, in domestic arbitrations at law, arbitrators must be Chilean. The international arbitration law specifically establishes that nationality shall not be a barrier for the naming of an arbitrator. The international arbitration law has also removed the requirement to be a lawyer.[29]

[b] Challenges to Arbitrators Based on Conflicts of Interest

Conflicts of interest, real or perceived, and related arbitrator disclosures are a rapidly evolving area of the law. Keeping this area clean is vital to the finality of individual arbitration awards, integrity of the arbitration process itself, and the client community's perception of that process.

In a recent case on point, the parties agreed on arbitration in São Paulo, Brazil, under UNCITRAL Rules, administered by the AAA. The parties agreed on the number of arbitrators (three) and the method of appointment: each party appointed one and the party-appointed arbitrators selected the third to be the chair. The parties also agreed on drawing up a submission agreement in which they expressly waived any challenges to all arbitrators. After two years of extensive production of evidence and hearings, the arbitral tribunal—with no dissenting opinion—issued the award. Immediately after, the losing party started judicial proceedings seeking the annulment of the award on the grounds that the arbitrator appointed by the wining party had not disclosed the fact that he had offered legal services several months before the commencement of the arbitration to a company member of the same group of companies as the winning party. The challenging party also alleged that it had become aware of this fact only after the award was rendered via internet research of the arbitrator's law firm.

The state court judge in São Paulo nullified the award based on Brazilian Arbitration Law Articles 32, II and VIII, 13, Paragraphs 6 and 14 of the Brazilian Arbitration Law. The court held that the provisions regarding disqualification and doubts of arbitrators and judges cannot be derogated or modified by the agreement of the parties. The judge also ordered the winning party (in the arbitration) to pay damages. The parties then settled the case.[30]

The conflicts area is one which does have a diverging cultural dimension that cannot

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[29] Andrés Jana and Angie Armer Rios, *Chile: Legislation Regarding Arbitration*, Arbitration Review of the Americas 2007, A Global Arbitration Review Special Report, at 32. Also *available at* http://www.globalarbitrationreview.com.

[30] ABN AMRO VENTURES B.V. v. Tele Norte Leste Participações S.A, Construtora Andrade Gutierrez S.A, Supertel Participações S.A. Asseca Participações S.A. and LF Tel. Participações S.A., before the 11th District Court of São Paulo Central Forum.

be ignored. The U.S. concept of conflict of interest casts a wide net in terms of both relationships covered and time frames involved. It is based on disclosure to the parties by an arbitrator candidate of any relationships that could reasonably give rise to a perception of conflict or bias. The parties are then free to waive their objections if they wish and accept the arbitrator, or challenge the arbitrator instead. This concept is embodied in the institutional rules of the AAA/International Centre for Dispute Resolution (ICDR).

The Western European concept of conflict may be embodied in the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration.[31] This approach is standards-based, as is much of European Community law and practice today. The Guidelines create three categories of situations—red, yellow, and green. For a discussion of the difference between the U.S. and European concepts of arbitrator conflicts, Peter Michaelson, an ICDR and WIPO (World Intellectual Property Organization) arbitrator, has prepared an article analyzing the consequences of applying the differing U.S. and European standards to an international arbitration case.[32]

The traditional Latin American concept differs significantly from these. Most Latin American law firms are relatively small and a number of them are family-controlled. Latin firms handling international business clients were few and far between. Therefore, it was not uncommon for different lawyers in the same firm to represent companies competing for business with each other. This was all the more so in smaller Latin countries with fewer and more concentrated international business markets.

In these countries, most Latin attorneys only found conflicts of interest when lawyers in the same firm represented companies competing against each other on the very same project or public bid, or as adversaries in the same litigation. The more recent growth of larger firms in the region—particularly in Mexico and Brazil—and the sprouting up of more firms representing international business clients may mature this concept over time, but the Latin American concept of family businesses and law firms does remain. This may affect choice of international arbitrators from Latin America, and an intriguing question here is whether local courts in Latin America will intervene to vacate awards based on non-local concepts of bias/conflict/non-disclosure by an arbitrator. Another question is whether and how the Latin American concept of conflicts will affect or be affected by the rapid expansion of large U.S. based law firms setting up offices in major cities such as Mexico City and São Paulo.

Under the 1996 Brazilian Arbitration Law (BAL) referred to earlier, if there is an arbitration clause containing a provision concerning the procedures for appointing the arbitrator—as, for instance, is the case where the clause refers to the rules of a particular arbitral institution (BAL, Article 5)—and one of the parties brings an action

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[31] For the full text of these guidelines, *see* the International Bar Association Home Page, http://www.ibanet.org.

[32] The article was presented at an ICDR seminar in Philadelphia, PA, U.S. on December 6, 2007 and is currently being prepared for publication.

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in court, the opposing party may file a motion to simply dismiss it and continue on with the arbitration. On the other hand, if there is an arbitration clause but no provision concerning the appointment of the arbitrator (BAL, Article 6), and should one of the parties show resistance as to the initiation of the arbitration, the other party may bring an action for specific performance.

[c] Other Considerations in Arbitrator Selection for International Arbitrations involving Latin American Parties

Even though arbitration has not been widely used in Latin America until recent decades, it is possible to find arbitrators with some experience in international arbitration, at least in the quantity and with the qualifications needed for the still-evolving Latin American arbitration "market." Most of them, however, are lawyers whose main practice has always been counsel to parties in arbitrations. This leads to the situation discussed in § 8.07[1][b] *above*. We can recall only a few lawyers whose main activity is to act as arbitrators.

It is quite possible to find lawyers in Latin America with language and cultural skills that enable them to act as international arbitrators, especially if the arbitrations are conducted in English or French. There is a good quantity of lawyers with LLM degrees from the U.S., but we assume arbitrators who can conduct an arbitration based on common law systems are scarce because common law is generally unfamiliar to Latin American lawyers.

[2] Institutional and *Ad Hoc* Arbitration in Latin America

Cases from Latin America at the ICDR/AAA, ICC, WIPO, and LCIA (London Court of International Arbitration) have been growing at rapidly increasing rates. Record numbers of Latin American arbitrations, many involving Argentina and arising from Argentina's economic crisis period several years ago, have also been filed at International Centre for Settlement of Investment Disputes (ICSID). Both the ICC and the AAA/ICDR report an increase in Latin American parties. To give a dramatic example, Brazil, which had only ratified the New York Convention in 2002, was listed by the ICC as the fourth ranking country in the world in terms of number of ICC cases in 2006. The increase in Latin American parties—and the concomitant increase in the number of arbitrators from Latin America—are in turn fueling a demand for increased education and training in arbitration for Latin American lawyers wherever the arbitration may be located.

The ICC's 2005 Statistical Report shows that so-called "American parties" were almost equally split between North America (52%), Latin America, and the Caribbean (48%). The U.S. remained the country with the highest number of parties to ICC arbitration. The increasing involvement of Brazilian and Mexican parties was confirmed with increases in number of cases involving parties from Brazil and Mexico of respectively, 17% and 35%, from the corresponding 2004 figures. The Report also shows the number of times the parties agreed to conduct arbitration in a Latin American country: Argentina (4), Brazil (1), Colombia (1), Guatemala (1), Mexico

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(10) and Uruguay (1).[33]

We received the following table of country-by-country case statistics for 2006 from the ICDR/AAA for Latin America/Caribbean:[34]

Frequency of Cases by South American Country	
Venezuela	7
Argentina	6
Brazil	6
Colombia	5
Ecuador	3
Chile	2
Peru	1
Paraguay	1
Uruguay	1

South American Hearing Locales Requested (2)
Buenos Aires, Argentina (2)

Frequency of Cases by Central American Country

Panama	5
Guatemala	2
Honduras	1
Costa Rica	1

Central American Hearing Locales Requested (1)
Tegucigalpa, Honduras

Non-US Caribbean Hearing Locales Requested (2)
Bahamas (2)

Frequency of Cases by Non-US Caribbean Country

British Virgin Islands	7
Bermuda	6
Dominican Republic	5
Cayman Islands	2
Bahamas	2
Barbados	2
Netherlands Antilles	1

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[33] ICC, International Court Bulletin, vol. 17/N. 1 (2006).

[34] Provided in a special email report to the authors from ICDR Vice-President, Luis Martinez, on June 14, 2007.

Turks and Caicos Islands	1
Totals	2006
South America	32
Central America	9
Caribbean (Non-US)	26
Mexico	5

TOTAL ICDR LATIN AMERICA/CARIBBEAN CASES 2006: 72

Statistics are not available for the World Intellectual Property Organization Arbitration and Mediation Center's (WIPO/Geneva) traditional intellectual property arbitration cases. The volume of these cases is relatively small, but with high claim amounts. Most come from Europe and the United States.

The WIPO domain name case model is the opposite—a very high volume of cases with no monetary awards. The maximum award consists of transfer of the domain name in dispute to the claimant. But note that some of these domain names can be worth a lot of money, such as cocacola.com, oglobo.com, vogueenespanol.com, and other high-visibility brand names. According to the case statistics available on the WIPO website, as of January 9, 2007, there were 763 cases involving Latin American or Caribbean parties out of a total of 9,727 UDRP-type domain name cases filed with WIPO to date. This represents 7.83% of some 9,727 total UDRP General Top Level Domain Name (gLTD) cases[35] filed at WIPO since 2000. Interestingly, this percentage is in line with the Latin America share of worldwide revenues of many large multinational companies.

In terms of physical presence of arbitral institutions in the region, the AAA/ICDR has had a satellite center in Mexico City for some time in an alliance with the *Centro de Mediación y Arbitraje Comercial de la Camara Nacional de Comercio de la Ciudad de Mexico* (CANACO).[36] CANACO developed as an outgrowth from the parallel private sector CAMCA (Commercial Arbitration & Mediation Center of the Americas) agreement between arbitral institutions in the U.S., Canada, and Mexico following the

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[35] UDRP stands for Uniform Dispute Resolution Policy, which is the predominant procedural framework used to resolve most internet domain name cases, along with the UDRP Rules deriving therefrom. The UDRP was developed by the Internet Corporation for Assigned Names and Numbers (ICANN) with inputs from the primary internet domain name dispute resolution providers such as WIPO. gLTD stands for General Top-Level Domain Names, which are, for example, domain names followed by the extensions ".com," ".org," and ".net."

[36] *See* Commercial Mediation and Arbitration Center of the National Chamber of Commerce of Mexico City Home Page, http://www.arbitrajecanaco.com.mx.

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ratification of the North American Free Trade Agreement (NAFTA) between these three countries. The Inter-American Commercial Arbitration Commission (IACAC) has national representatives in most Latin American countries and its caseload is administered by the ICDR. The IACAC was created by the Panama Convention on enforcement of foreign arbitral awards in the Western Hemisphere. The ICC has installed a regional office in Santiago, Chile which has recently moved to Panama. The ICC also established a Latin America Advisory Group that meets periodically at ICC headquarters in Paris.

In Latin America, there have been many initiatives to create and/or strengthen the existing centers to administer arbitration and mediation proceedings.[37] Some of these centers are affiliated with commercial organizations such as local chambers of commerce and industry. One of the best examples of the increasing use of arbitration—especially domestic—is the Arbitration Center of the Lima (Peru) Chamber of Commerce (*Centro de Arbitraje de la Cámara de Comercio de Lima*), which boosted its caseload up from a handful of cases filed in 1993 to an average of 250 cases filed *per year* in the last three years.

Some, like the Association of American Chambers of Commerce of Latin America (ACCLA), have entered into cooperative agreements with international arbitral institutions like the ICDR to jointly promote local and international arbitration in each country. In many instances, these centers play important roles in educating the local commercial leaders and bar about the benefits of arbitration.

The quantity and growth of *ad hoc* arbitrations in Latin America are by their very nature harder to measure and gauge, as arrangements are made by the parties themselves and kept in confidence. The International Institute for Conflict Prevention and Resolution (CPR),[38] based in New York, is one of the primary advocates of *ad hoc* arbitrations. However, CPR was not able to provide any reliable statistical information on the number of *ad hoc* arbitrations involving Latin American parties. For several interesting cases involving the interplay of institutional and *ad hoc* arbitrations in Latin America, *see* § 8.06 *above*.

One relatively new and challenging trend involves efforts by some parties to arbitration to "mix and match," clauses calling for *ad hoc* arbitrations, "borrowing" the rules of one of the arbitral institutions, but without the accompanying administration by that institution. This approach is designed to save administrative costs for the parties, but carries with it a series of pitfalls and perils.[39]

[3] Evidence

As noted in the introductory section to this chapter, almost all Latin American

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[37] There were, in most countries, traditional centers, mainly based on the Chambers of Commerce, but they have dealt more with domestic rather than international arbitration.

[38] *See* International Institute for Conflict Prevention & Resolution Home Page, www.cpradr.org.

[39] For more information on this issue, please *see* Mason, Paul E. "Whether Arbitration Rules Should be "Borrowed" from the Issuing Arbitral Institution." *LexisNexis® Emerging Issues Analysis*, 2008 Emerging Issues 1149 (February, 2009).

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jurisdictions are based on civil law. This means that the primary means of adducing evidence are through documents and the inquisitorial method—review and examination of the documents by a judge or arbitrator. This is in stark contrast to the U.S. common law system of adducing evidence through attorney-dominated discovery and the adversarial method of attorneys examining and cross-examining live witnesses on the stand. These U.S. methods usually pose a threat in terms of cost, confidentiality, and civility to Latin American counsel.

International arbitration is by its very nature a flexible proceeding where the arbitrators in the same case may come from jurisdictions with different legal traditions regarding production of evidence. With an eye to dealing with these questions in advance, the IBA issued a set of Rules on the Taking of Evidence in International Commercial Arbitration, adopted by the IBA Council on June 1, 1999. The goal of these Rules is to harmonize proceedings that may involve parties from these differing legal traditions. For example, they provide for a very limited and defined form of document discovery. In most international commercial arbitrations, other forms of U.S. style discovery, such as interrogatories, requests for admission, and depositions, are normally discouraged by the arbitrators.

[4] Costs

As with other international commercial arbitrations, costs for international commercial arbitrations with Latin American parties is a function of the complexity of the matter being arbitrated, the number and caliber of arbitrators, the arbitral institution used, and the location of the hearings. In addition, there may be additional costs to arbitration if discovery is permitted. Finally, if there are attempts to stall the arbitration or vacate the award in the local courts, significant time and cost may also be incurred.[40]

[5] Other Considerations

One very important factor here is whether reasoned awards need to be issued in arbitrations with Latin American parties, or whether a simple non-reasoned award will suffice to withstand legal scrutiny.

In Brazil, the story has not yet been completely written. Article 26 (II) of the Brazilian Arbitration Law 9.307/96 provides that in order for an arbitral award to be legally valid, it must be reasoned.[41] Even so, there is an open question as to whether an arbitral award made outside Brazil must be a reasoned one in order to be enforced in Brazil by Brazilian courts. This question is at issue in the case of *Kanematsu USA Inc. v. ATS—Advanced Telecommunications Systems do Brasil Ltda* (ATS).[42] In this

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[40] In Argentina, for example, the action to set aside an award is subject to the tax imposed to any judicial action (*tasa de justicia*), which is 1.5% or 3% of the amount at stake.

[41] "Article 26 - The arbitral award shall mandatorily contain: 1. a report, including parties' personal data, as well as a summary of the dispute; 2. the grounds for the decision, with due analysis of factual and legal issues, including, if it is the case, a statement of the decision in equity."

[42] SEC 885/USA. Kanematsu USA Inc v. ATS - Advanced Telecommunications Systems do Brasil Ltda. (Brazilian Superior Court of Justice—STJ) *available at* http://www.stj.gov.br/webstj/processo/

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case, Kanematsu sought to enforce (in Brazil) a foreign arbitral award rendered against ATS under the AAA Commercial Rules. As noted earlier, the AAA Commercial Rules do not require (and do not even default to) a reasoned award, and accordingly, the arbitral award rendered in favor of Kanematsu was not reasoned. It is not clear to us why the Commercial Rules were used in this arbitration, as it is normal AAA practice to have parties from different countries use the AAA International Rules instead. Perhaps the arbitration clause was simply copied and pasted directly from a standard U.S. domestic version of the contract, or perhaps the parties insisted on the application of the AAA Commercial Rules in their arbitration clause or later on in the proceedings

Brazil finally ratified the New York Convention in September 2002, bringing the question of enforcement of foreign awards partially under the wings of the Convention. We say "partially" because the tendency of the Brazilian courts in cases involving ratification of foreign arbitral awards has not been to rely solely or even primarily on the New York Convention, but instead to cite to domestic Brazilian legislation and jurisprudence.

ATS now claims Kanematsu's petition for enforcement of the AAA award is a violation of public policy contrary to Article 26 (II) of the Brazilian Arbitration Law. However, neither Kanematsu nor ATS made a written request to the arbitral tribunal for a reasoned award. Therefore, if the parties themselves voluntarily agreed to arbitrate under this condition, and this condition was in accordance with the *lex arbitri*, the question is why should the award not be recognized by the Brazilian Federal Court of Justice (STJ), which has jurisdiction over ratifications of foreign arbitral awards?[43]

A related question is whether the STJ will apply the relatively new concept of "international public policy" in recognizing the AAA arbitral award in favor of Kanematsu. Brazilian arbitration practitioners would certainly welcome the application of international public policy in Brazil, which would leave behind the old and overbroad interpretation of the *Supremo Tribunal Federal* (STF) on Brazilian domestic public policy as applied to arbitral awards.

It is worth noting here, that much like the issues that surround unreasoned arbitral awards, similar issues have arisen with respect to preliminary decisions made by arbitrators who do not provide reasons for those decisions. Indeed, *National Grid Transco plc (UK) v. Argentina* indirectly illustrates the hazards of not providing

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Justica/detalhe.asp?numreg=200500348987&pv=000000000000. The following description of the proceedings is taken from the site of Brazilian attorney Pedro Alberto Costa Braga de Oliveira, dated September 30, 2006: http://arbitrationlaw.blogspot.com/2006/09/enforcement-of-unreasoned-awards-in.html.

[43] Constitutional Amendment No. 45/2004, which entered into force on December 31, 2004, transferred the jurisdiction for the ratification (*exequatur*) of foreign arbitral awards from the Supreme Federal Tribunal (STF), the nation's highest court, to the STJ. Interestingly, these authors spoke with one of the STF Justices ("Ministers") while it still held jurisdiction over these procedures in the late 1990s. He informed the authors that he could not remember a single foreign arbitral award ratified by the STF during his tenure there. In contrast, the STJ has an excellent record of ratifying these awards over the past several years since it has obtained jurisdiction over this procedure, possibly in part, because Brazil ratified the New York Convention in 2002.

reasoned important preliminary decisions. This case involved a bilateral investment treaty (BIT) arbitration held in Washington, DC which tangoed on and through numerous stages. One of them was an action filed by Argentina in the Federal Courts of Buenos Aires to set aside the decision of the ICC International Court of Arbitration which had rejected the challenge against one of the arbitrators. The Court agreed to issue an injunction to suspend hearings because in pursuance of normal ICC policy, the ICC Court decision on the challenge to the arbitrator was not reasoned. The Argentine Court, although not explicitly saying so, hinted that this kind of unreasoned decision was contrary to Argentine constitutional requirements.[44]

§ 8.08 Settlement and Mediation

[1] Multi-Tier Dispute Resolution Mechanisms in Latin America

A multi-tier dispute resolution mechanism is one that provides for a combination of negotiation, mediation and/or arbitration. A major issue raised in litigation over these clauses concerns the clarity of the prior negotiation and/or mediation requirement as expressed in the clause, whether prior negotiation and/or mediation are absolute preconditions to arbitration or not, and what timing must be observed before an arbitration can be triggered. Many contracts within the energy sector have multi-tier clauses, although we are not aware of any relevant court cases from Latin America on the validity or enforceability of these clauses. The authors are aware of some multinational high technology companies that use clauses calling for mediation followed by litigation and skipping arbitration altogether. This may stem from lingering distaste over the famous *IBM v. Fujitsu* arbitration many years ago in which the arbitrator awarded a compulsory license to Fujitsu to use IBM's prized mainframe software.

[2] Mediation in Latin America

Some increase in mediations has been observed. Without going into details, as this chapter focuses on arbitration and not mediation, we believe that many companies are taking advantage of the mediation option as a cost and relationship saving measure. Even without multi-tier dispute resolution clauses in the parties' business agreements, the ICDR and the ICC encourage parties filing cases there to first try mediation. At least one of the authors of this chapter has had several experiences with ICDR and ICC Latin American cases over the last two years, both as counsel and as mediator, where mediation was chosen and results were positive. The ICDR has an active international panel of mediators while the ICC's Amicable Dispute Resolution ("ADR") Service draws on mediators from rosters put together by the respective National Committees representing the ICC in each country.

There has also been a move to strengthen the legal underpinning for mediation in several countries in Latin America. Argentina is known for having the most

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[44] Since investment arbitration is outside the scope of this book, for more details please *see* Mason, Paul E. "Mason on Reasoned Awards or Preliminary Decisions in International Arbitrations." *LexisNexis® Emerging Issues Analysis*, 2008 Emerging Issues 1286 (December, 2007).

comprehensive and active mediation law and regulatory program, which has been in force since the late 1990s. There, most classes of cases *must* go through an attempt at mediation before the courts will accept them. Brazil's legislature has been considering a mediation bill, although it is not clear whether or when it may emerge from the legislative thicket. The bill is aimed primarily at mediations stemming from cases filed in court, as opposed to so-called private "extra-judicial" mediations, but also has provisions which intend to regulate the mediator profession. The most controversial provisions of the bill appear to be whether mediation efforts should be compulsory (as in the Argentine Mediation Law for the Buenos Aires capital region) and whether mediators must be attorneys or not. A "Technical Note" signed by the former Chief Justice of Brazil's STF recently came out against the Bill, citing its compulsory nature and lack of financing resources among other issues.

§ 8.09 Enforcement and Setting Aside of Awards

[1] Application of International Treaties Supporting Arbitration

Most countries in Latin America also have ratified the key international arbitration conventions, including the New York Convention and the Inter-American Convention on International Commercial Arbitration (Panama Convention).[45] Some Latin American countries, though not all, have also ratified the Washington (ICSID) Convention.[46]

The New York,[47] Panama,[48] and Washington[49] Conventions have been ratified by the majority of Latin American countries. By ratifying these international conventions and enacting new domestic arbitration laws based on the UNCITRAL Model Law, Latin American countries have also endorsed legislative policies favoring the recognition of the full effects of arbitration agreements and limiting the grounds to deny recognition and enforcement of foreign arbitral awards.

According to a recent note in the online version of the *Global Arbitration Review,*

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[45] For a complete text, *see* Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, S. Treaty Doc. No. 97-12 (1981), 14 I.L.M. 336, *available at* http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp.

[46] For a complete text, *see* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, *available at* http://www.worldbank.org/icsid/basicdoc/partA.htm.

[47] Argentina (1989), Bolivia (1995), Brazil (2002), Chile (1975), Colombia (1979), Costa Rica (1987), Cuba (1974), Dominican Republic (2002), Ecuador (1962), El Salvador (1998), Guatemala (1984), Honduras (2000), Mexico (1971), Nicaragua (2003), Panama (1984), Paraguay (1997), Peru (1988), Uruguay (1983), Venezuela (1995). A list of all New York Convention countries *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

[48] Argentina (1995), Brazil (1995), Chile (1976), Colombia (1986), Costa Rica (1978), Ecuador (1991), El Salvador (1980), Guatemala (1986), Honduras (1979), Mexico (1978), Panama (1975), Paraguay (1976), Peru (1989), Uruguay (1977) and Venezuela (1985). A list of all Panama Convention countries *available at* http://faculty.smu.edu/pwinship/arb-22.htm.

[49] Argentina (1994), Bolivia (1995), Chile (1991), Colombia (1997), Costa Rica (1993), Ecuador (1986), El Salvador (1984), Guatemala (2003), Guyana (1969), Honduras (1989), Nicaragua (1995), Panamá (1996), Paraguay (1983), Peru (1993), Uruaguay (2000) and Venezuela (1995). A list of all Washington Convention countries *available at* http://www.worldbank.org/icsid/constate/c-states-en.htm.

a court in El Salvador agreed to enforce an international arbitration award in a landmark decision:[50]

> A court of first instance granted the Marriott Group an order for execution in May. Lawyers in El Salvador say it is the first attempt to enforce an arbitral award in El Salvador. The award was enforced under the Panama and the New York Conventions.
>
> Salvadorian company Hoteles y Desarrollos has since paid the Marriott Group over US$2 million to satisfy an award rendered in a contract dispute about use of the Marriott brand name. The case was heard under the rules of the Inter-American [Commercial Arbitration] Commission.
>
> In January the Supreme Court of Justice of El Salvador recognized the arbitral award and ordered its execution in the local Salvadoran courts. Under Salvadorian law the Supreme Court is the authority that has to recognize the validity of an international award in order for it to be enforced.
>
> The arbitral dispute, heard in Miami, concerned a contract to use the Marriott brand name. The tribunal issued its award in favour of the Marriott Group in October 2005 ruling that Hoteles y Desarrollos had breached contractual obligations. El Salvador [ratified] the Panama Convention in 1980 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1998.[51]

Taking into account that international trade among Latin American countries and between Latin American countries and the United States is increasing, a note should be made regarding the relationship between the New York and Panama Conventions under U.S. law. Section 305(1) of Chapter 3 in the U.S. Federal Arbitration Act (FAA),[52] sets forth that "[i]f a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or accede to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply."

Although provisions of New York and Panama conventions are similar[53] regarding *vacatur* of arbitral awards, there may sometimes be a need to explore the differences further.[54]

[2] Recent Judicial Decisions on Enforcement of Foreign Arbitral Awards Based on Grounds Such as Public Policy

Good laws serve no purpose if they are not correctly construed and applied by national courts. Indeed, this is an ongoing problem in Latin America. As one respected authority on arbitration in the region wrote:

> Despite the rosy landscape generally presented by the black letter law on arbitration in Latin America after its recent modernization, its substance or spirit has not always been properly understood or applied.

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[50] *Marriott Group successfully enforces in El Salvador,* Global Arb. Rev. online, June 15, 2007, *available at* http://www.globalarbitrationreview.com/news/news_item.cfm?item_id=3847.

[51] *Marriott Group successfully enforces in El Salvador,* Global Arb. Rev. online, June 15, 2007, *available at* http://www.globalarbitrationreview.com/news/news_item.cfm?item_id=3847.

[52] 9 U.S.C. §§ 1-16, 201-208, 301-307 (1994).

[53] To see the differences between *vacatur* and refusal to recognize an execute an award under New York and Panama Conventions, *see* John P. Bowman, *The Panama Convention and its Implementation under the Federal Arbitration Act*, Kluwer Law International 89 (2002).

[54] John P. Bowman, *The Panama Convention and its Implementation under the Federal Arbitration Act*, Kluwer Law International 89 (2002).

In certain cases, the Latin American courts have ignored express legal provisions aimed at facilitating arbitration or ensuring its efficacy, or advanced results notoriously incompatible with the policies favorable to arbitration underlying the new and updated legal arbitration framework.[55]

The involvement of local courts in the enforcement of foreign arbitration awards influences the flow of international commerce. The possibility of future disputes is a risk of any transaction. The risk is substantially greater if a real danger, such as the losing party refusing to honor an award, exists. In such cases, the winning party will need to seek enforcement by a local court in the country where the loser makes its home and has its assets. In these circumstances, businesses often perceive that there is a risk that a local court might favor a national of its own country. And even when there is confidence that favoritism will not affect the decision, the defendant party may have a home field advantage in the enforcement proceedings. These risks are greater when the losing party is a state entity or where the national economic interest of the loser's country might be affected by the outcome. Some typical examples of Latin American court decisions are found in the section of this chapter dealing with commercial arbitration involving states as parties. *See* § 8.05 *above*.

§ 8.10 Promotion of Arbitration and Training

[1] Growing Use and Promotion of Arbitration by Latin American Oriented Multilateral Funding Agencies

The reluctance of Latin America countries to practice International Commercial Arbitration (ICA) has been a long standing problem in the field of international law. This reluctance prompted unfriendly arbitration legislation and has kept many Latin America countries from joining the major ICA conventions. Recently, however, many countries in the region have undertaken major steps to make their legal systems more receptive to ICA, which has substantially changed the legal regime in the region.

Latin American judicial systems suffer from major problems including an overload of cases, an absence of adequate technological support, and lack of confidence in judges.[56] One common response to these problems, characteristic of judicial reform programs throughout Latin America, is the promotion of ADR, and especially arbitration, as a means to assist the judiciary.[57]

The promotion of ICA as an alternative to litigation began in Latin America in the early 1990s as a response to the crisis in the judicial systems, globalization, and Latin

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[55] Horacio A. Grigera-Naón, *Arbitration and Latin America: Progress and Setbacks – 2004 Freshfields Lecture*, 21 Arbitration International 127, 150 (2005).

[56] For a study on the performance and the crisis that Latin American judiciary systems experience *see*, Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. Int'l L. 167 (1995).

[57] For more information of an overview of the development of arbitration in the region, *see* Horcio Grigera-Naón, *Arbitration in Latin America: Overcoming Traditional Hostility*, 22 U. Miami Inter-Am. L. Rev. 203; Nigel Blackaby and Sylvia Noury, Freshfields Bruckhaus Deringer, *International Arbitration in Latin America*, Latin Lawyer Review—Arbitration (privately circulated undated article); Daniel Gonzales, George Hritz, Marcos Rios and Richard Lorenzo, *International Arbitration: Practical Considerations with a Latin American Focus,* The Journal of Structured and Project Finance (2003).

America's increasing openness to foreign investment and infrastructure projects. Arbitration is seen as a means to "diversify access to justice and control the costs of administering the judicial system."[58]

The new attitude towards arbitration is revealed by related developments involving certain Latin American institutions and business. In recent years, local chambers of commerce and other institutions have either created or revitalized numerous local ADR institutions that administer arbitration proceedings and provide arbitration rules for commercial and other disputes.

In some jurisdictions, this has been done with the assistance or under the sponsorship of the Inter-American Development Bank (IDB), through the Multilateral Investment Fund (MIF). The MIF, established in 1993, was designed as a new type of technical assistance mechanism to stimulate innovation and extend beyond existing bilateral and international assistance instruments for Latin America and the Caribbean. Using both grants and investment mechanisms, the IDB/MIF has introduced the use of ADR mechanisms in 18 countries[59] and generated an ongoing regional ADR movement. Working in partnership with local business groups, these projects have created a new option for settling commercial disputes and are contributing to the modernization of the judicial system in the region.

Through direct and indirect support, MIF helped establish and strengthen several Arbitration and Mediation Centers (CAMs). It has been observed that: "Strengthening the CAMs and the process of legislative harmonization at the regional level has generated an additional positive result: the institutions supported by MIF projects have become national chapters in the IACAC. This is an important mechanism for ongoing development of ADR, as it provides a forum for mutual support and exchange of views."[60]

Arbitration is the dispute resolution mechanism of choice in equity related investment agreements involving the IDB and its private lending arm, the Inter-American Investment Corporation (IIC) and the World Bank's Multilateral Investment Guarantee Agency (MIGA). However, arbitration is not used in classic loan deals for which promissory notes are issued and loan agreements provide for New York law and courts generally.

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[58] Diana Droulers, *Alternative Methods of Dispute Resolution in Latin America*, ICC Int'l Ct. Arb.Bull., Special Supp., at 55 (2001).

[59] For a full description of all countries and the status of each project, *see* http://www.iadb.org/mif/projects.cfm?lang=en (last visit on May, 26, 2010).

[60] Multilateral Investment Fund, Inter-American Development Bank, Alternative Dispute Resolution—Lessons from Innovation—Arbitration and Mediation – Improving Business Environment – Impartial Solutions Efficient Processing – Modernizing Legislation – Cultural Change, 8 (2004) *available at* http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=431028.

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[2] Promoting Arbitration in Latin America—Cultural Issues, Education, and Technology

[a] Posture of the Latin American Judiciary *vis-à-vis* Arbitration

The changes in Latin America described earlier in this chapter might prompt one to quickly conclude that the use of international commercial arbitration in Latin America is in good shape. But Latin American countries needed to adopt in a very short time a legal regime that they had rejected for more than a century. Therefore, despite the movement towards the harmonization and modernization by national legislatures and the fast development of international arbitration during the last decade, challenges and concerns still persist.

The biggest obstacle to the further take-up of ICA in Latin America is now found not in formal legal rules, but, perhaps, in the absence of a legal culture hospitable to arbitration. The lack of such culture explains why countries that have adopted a modern legal framework (national law based on the UNCITRAL Model Law and the ratification of major international conventions) still produce decisions that ignore the willingness of the parties to submit their dispute to arbitration. While it is true that in most cases, unfortunate rulings have been overturned on appeal, the fact that they take place may diminish the confidence in arbitration.

For instance, it is not unusual to find national courts refusing to enforce an agreement to arbitrate by issuing orders (injunctions) to prevent a party from initiating or continuing with arbitration elsewhere, or by denying the enforcement of arbitral awards. In the current state of development of international commercial arbitration, national courts throughout Latin America have sometimes imposed a judicial resolution process instead of the one negotiated by the parties.

[b] Arbitration and Local Licensing Requirements

As globalization has affected the business world, so has it touched the practice of law—although to a far lesser extent because of protective local bar restrictions on the practice of law by outside lawyers in most countries and provinces/states/political subdivisions within those countries. These restrictions can also affect international arbitration practice to a certain degree, especially when the arbitration involves parties from foreign countries who wish to be represented in the arbitral forum by their own counsel from home.

By this time, most arbitration practitioners are familiar with the Florida *Rapoport* case[61] and the resulting Florida Supreme Court Rule 1-3.11 (Appearance by a Non-Florida Lawyer in an Arbitration Proceeding in Florida) which went into effect on January 1, 2006. Florida is an important U.S. state for international arbitration because Miami is the hub for many Latin American business transactions and has successfully

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[61] The Rule was drafted because a lawyer from another U.S. state (Mr. Rapoport) without a license to practice in Florida prominently advertised in Florida and elsewhere that he was available to represent claimants in securities related arbitrations held in Florida. *See* Fla. Bar v. Rapoport, 845 So. 2d 874 (Fla. 2003).

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cultivated advantages for international arbitrations involving Latin, European, and Asian parties. Other Florida cities such as Tampa and Orlando have also been seats of international commercial arbitrations. The Florida Supreme Court Rules resulted in a compromise from the original version drafted by the Florida Bar, which limited appearances by non-Florida lawyers (whether from other U.S. states or other countries) in all kinds of arbitrations to only three per year and included attendant registration and fee requirements. The International Litigation and Arbitration Committee of the Florida Bar's International Law Section was able to intercede and carve out an exception for *international* arbitrations held in Florida, where no such limitations will be imposed. International arbitrations are defined in the Rules as those covered by Florida's International Arbitration Act.[62]

Arbitration has expanded significantly in Brazil since its highest court, the Supreme Federal Tribunal (STF) upheld the constitutionality of its 1996 Arbitration Law in 2001, and the country ratified the New York Convention in 2002. However, the country has also suffered a glut of so-called "fake arbitral chambers" run by amateurs or charlatans without any qualifications using official judicial insignias, terminology, and other artifices to confuse and lure potential clients. This has brought on some investigations for abuse of the judicial *imprimatur* at the behest of local bar associations. In response, the Brazilian Arbitration Committee (CBAr) decided to circulate an educational letter explaining the nature and benefits of arbitration and what is required to form a veritable, true, and trustworthy arbitration chamber.

A recent consequence of the investigations culminated in a somewhat draconian stipulation reached on June 12, 2007 between the public prosecutor of Brasília and the so-called "Tribunal of Arbitral Justice of the Federal District of Brasília."[63] Under the terms of this stipulated agreement, approved by a local court, in order to avoid any further confusion by consumers, this group must cease using terminology such as "tribunal," "judge," "arbitral judge," "process," "citation," and "intimation" since these are terms commonly associated with the public court system rather than a private dispute resolution center. Furthermore, this group must also stop using judicial type insignias, summoning parties, and inserting arbitration clauses in non-negotiable contracts of adhesion. The penalty for violations is severe—a fine of R$500,000 Brazilian *reais,* equivalent to more than US$312,000 dollars as of the date this chapter was prepared.[64]

However, certain federal and state lawmakers have been pushing legislation regulating the profession of arbitrator in a heavy-handed manner. Along this line, the so-called "Marquezelli bill" (*anteprojeto*) was introduced in the Brazilian Congress but tabled in 2006. Recently, there was a request by one of the bill's sponsors to remove it from the file and activate it for legislative approval, something which the

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[62] *See* Fla. Stat. Ann. §§ 684.01 to 684.35.

[63] Press Release, AMESCO Arbitragem & Mediaçaõ, Terminologia jurídica não pode ser utilizada por tribunais arbitrais. *See* AMESCO Home Page, http://www.amesco.com.br.

[64] Press Release, AMESCO Arbitragem & Mediaçaõ, Terminologia jurídica não pode ser utilizada por tribunais arbitrais. *See* AMESCO Home Page, http://www.amesco.com.br.

CBAr and Arbitration Committees of the Rio and São Paulo Bar Associations have resisted.

Along with various state branches of the Brazilian Bar, the CBAr and CONIMA (*Conselho Nacional de Instituições de Mediação e Arbitragem*, or National Council or Mediation and Arbitral Institutions) were recently invited to join a special government commission in an effort to clamp down on fake tribunals and regulate the practice of arbitrators. Virtually all of these quack efforts are directed at local disputes (consumer, family, etc.) and not more sophisticated international commercial cases and clients. Nevertheless, it is hoped that these two professional groups will be able to rein in unnecessary government regulation and ensure that the innocent are not being punished for the sins of the guilty.

[c] Formation of a Latin America "Arbitration Bar"

The growth in number, size, and prominence of Latin American-related international arbitrations has given birth to an informal but well-known "arbitration bar." This group includes lawyers and law firms from Latin America, U.S., Europe, and Latin American arbitration cases, trends, and movement in this "bar" are reported frequently in European professional periodical publications such as *The Journal of International Arbitration*, *Latin Lawyer*, and the *Global Arbitration Review*. In the U.S., these cases, trends, and movements are reported in publications such as Lexis-Nexis' online Emerging Issues Analysis series and *Mealey's International Arbitration Review*.

We also observe the growth of in-country professional groups dedicated solely to arbitration, such as the CBAr, which has over 150 members, includes many of Brazil's major law firms that deal with international business, and publishes its own journal (*Revista Brasileira de Arbitragem*) on a quarterly basis. The bar associations of the states of Rio de Janeiro (OAB-RJ), São Paulo (OAB-SP), and Paraná (OAB-PR) all have sections dedicated to arbitration practice.

Many major European and U.S. law firms, representing both Latin American and foreign clients in the proceedings, are quite active in Latin American arbitrations. Certain European firms have all but specialized in Latin American investment arbitrations, and Houston-based law firms have carved out specialty arbitration practices in the Latin American oil, gas, and energy fields.

[d] Education, Training, and Research

Just as professional seminars are being held across Latin America to spread the arbitration culture among today's lawyers in the region, Latin American universities and law schools have also begun to add courses on arbitration—including international arbitration—to their curricula in order to educate tomorrow's crop of legal practitioners.[65] Not only that, certain U.S. law schools which focus on Latin America, such as the University of Miami (Florida) Law School, offer both international arbitration

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[65] We have proposed and concretized, this approach at the University of Buenos Aires Law School. *See* Roque J. Caivano, *Los medios alternativos de resolución de controversias y la formación profesional de los abogados*, Revista La Ley, 1995-D, 1052.

courses and Latin American arbitration courses. This is a trend that one can see through Latin American universities, although most of the existing courses in the region give priority to domestic arbitration.

In the research area, the University of Miami Law School invited a Brazilian arbitration law specialist Mauricio Gomm-Santos in 2006 to help develop plans to create the Institute for the Study of International Arbitration (ICA) and teach a course devoted specifically to arbitration in Latin America in the fall of 2007, which course has been given every year since then. The Institute is now directed by renowned international arbitration authority Jan Paulsson as President, with courses also given by Albert Jan Van den Berg and other prominent international arbitration authorities. The University of Miami attracts graduate practitioners from all over Latin America for its LL.M program in International and Comparative Law, which offers courses related to ICA. Among its objectives, the Institute aims to support the J.D. and LL.M programs by: (i) enhancing education related to international commercial arbitration; (ii) providing professional and continual education and training for legal practitioners, academics, judges, government officials, and arbitral institution staff regarding the practice of ICA; and (iii) conducting and supporting data-gathering related to international commercial arbitration.

One of the recent initiatives in that sense, which hopefully will contribute to the culture of international commercial arbitration among Latin American lawyers, is the Arbitration Moot (*Competencia Internacional de Arbitraje Comercial*) launched in 2008 by the University of Buenos Aires Law School and co-organized since 2009 by the University of El Rosario Law School (Bogotá). This Moot is aimed at fostering and deepening the practice of international commercial arbitration among Spanish-speaking students.[66]

§ 8.11 Conclusion

In this post-privatization era, arbitration has gained increasing importance and respectability in Latin America. However, the explosion of investor-state arbitration has raised some serious resistance and concerns among governments which may spill over into the commercial arbitration space, especially when the state is a party in commercial arbitrations. Private international commercial arbitration, on the other hand, seems to be growing rapidly along with the worldwide economic crisis. These developments represent important challenges for both arbitral institutions and governments in terms of creating new visions to shape arbitration in the region in the future, and creating concrete initiatives to promote international arbitration through, legal reform, education and training.

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[66] In the 2009 edition, there were 24 teams participating, including universities from Argentina, Chile, Colombia, Ecuador, Panamá, Paraguay, Perú, Uruguay, and Venezuela.